Supreme Court, U.S.
FILED
SEP 19 1995
CLERK

No. 95-114

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Two

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

As recounted by the court below, the evidence in this case, viewed most favorably to petitioners, shows that their proposed building project helped to prompt the City of San Bernardino (respondent) to recognize the need for, and to adopt, revised citywide land-use regulations that would protect neighborhood-quality and environmental values threatened by projects like petitioners'. The City, moreover, refused to allow petitioners' building project (on which construction never began) to escape application of the new regulations by slipping in under the wire before the revised rules took effect. On these facts, petitioners in this case do not complain of any violation of state law, or of any procedural due process problem, or of any Takings Clause violation, or (at this stage of the case) of the absence of the legitimate rational basis required by the equal protection clause. Rather, they allege

a substantive due process violation. Their petition, however, suffers from a fundamental, dispositive defect: they do not attack the legal standard that the court below applied to reject their claim. For that simple reason, and because it is plain that no other jurisdiction would apply a higher standard or find a substantive due process violation in these circumstances, certiorari should be denied.

STATEMENT

1. Background

Petitioners own a parcel of undeveloped land in the foothills of the City of San Bernardino. The parcel was part of a larger area on which petitioners had been building homes since 1964. The parcel at issue was "zoned R-3 for multi-family housing pursuant to the master plan for the property." Pet. App. A6.[1]

At the end of May 1986, petitioners submitted to the City an application for review of their proposed plan to build an apartment complex on the parcel, with all the structures to be three stories. Pet. App. A6. At the time of the application, the City had under way a comprehensive review and revision of its R-3 zoning ordinance, prompted by "an explosion of apartments." RT 810, 1056, 2434-35; Pet. App. A7.[2] The review process for applications like petitioners' required several approvals, some ministerial and some discretionary, culminating in approval by the Planning Commission and/or the City Council through an appeal process. Pet. App. A6-A7 & n.4. The City's policy at the time of petitioners' applica-

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[1] The court below noted evidence that the area had been annexed to the City in 1968 with petitioners' consent and that some city officials at the time had provided assurances of "the zoning necessary to implement the master plan"—assurances, the court observed, that could not legally limit the future exercise of the police power by the City. Pet. App. A6 & n.3.

[2] "RT" refers to the reporter's transcript from the trial in this case. "JA" refers to the joint appendix in the Court of Appeal below.

tion was to review some "development applications under the procedures in effect at the time the plans were submitted." Pet. App. A6.[3]

The City adopted its revised R-3 zoning ordinance on October 22, 1986. The new citywide ordinance made numerous changes, one of which limited the height of apartment buildings to two stories on the perimeter of a project (allowing three stories on interior buildings), unless an exception was allowed by grant of a conditional use permit. Pet. App. A7; RT 837-38, 2431-32. And the City's law now declared that the new ordinance's standards would apply to any project that had not yet been approved by the Development Review Committee within 30 days of the ordinance's adoption, thus altering the previous City "effective date" policy. Pet. App. A8; *see* note 3, *supra*. More than 40 pending projects, as well as all future projects in the foothills and other areas of the City, were affected by the new measure. RT 3919-21, 4110-11, 4125-26.

Petitioners' project, which proposed three-story structures throughout the apartment complex, was covered by the new zoning measure because the requisite approvals had not been obtained. Pet. App. A8-A10.[4] In particular, petitioners' application was pending in an appeal, brought by City Councilman Marks, from an Environmental Review Committee decision that petitioners did not have to prepare an environmental impact report. Pet. App. A9. A further appeal to the City Council, brought by "[o]bjecting homeowners in the neighborhood," led to a lengthy public hearing on November 17, 1986. Pet. App. A9.

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[3] More precisely, as the Court of Appeal later noted, the standards that were in effect upon filing of an application were applied to the application *as long as* it was approved by the Development Review Committee within one year. Pet. App. A8 n.5.

[4] There was evidence that the City had petitioners' project in mind in changing its "effective date" policy for applying new zoning standards to not-yet-approved projects. Pet. App. A8.

After hearing "presentations by the homeowners, their attorney, and various experts about the potential environmental effects of the project," the City Council decided to require "a focused environmental impact report for the project." Pet. App. A9. The City also informed petitioners that, unless redesigned, the project would require "a conditional use permit due to the nonconformity with the new provisions of the R-3 ordinance; namely, the three story construction structures." Exhibit 13; RT 836-38; *see* Pet. App. A10.

Petitioners "accepted" the requirement of an environmental impact report, but they did not prepare one. Pet. App. A10. Nor did they seek a conditional use permit. Nor did they redesign their project to come within the rule limiting perimeter buildings to two stories. Rather, petitioners asked the City Council "to grandfather [their] project so that it could proceed under the requirements of the prior ordinance." Pet. App. A10; RT 838, 1849.[5]

That request was under review by the City (specifically, by the City Council's Legislative Review Committee, the Planning Director, and the City Attorney) when, in March 1987, a completely unrelated suit was brought in state court (by persons unconnected with this case) challenging the City's General Plan as outdated and contrary to state law. Pet. App. A11; JA 1590; RT 1088. The state court in that action imposed a moratorium on development, and the City responded by stopping all new construction and the processing of applications for construction until the suit was concluded. Pet. App. A11;

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[5] Petitioners said that they did this without first preparing the required environmental impact report because they did not want to incur the expense of preparing the report without knowing at the outset that the three-story project would be allowed. Pet. App. A10. Petitioners' testimony at trial showed that preparation of an environmental impact report—and petitioners "accepted" the duty to prepare one—would take "at least a year." RT 2632. As a result, it is ultimately immaterial to this case that the City reduced from one year to 30 days the time allowed for approval of a pre-ordinance application before the new standards took effect. *See* note 3, *supra*.

Exhibit 17; RT 867; Exhibit 43. In June 1987, the State's Office of Planning and Research likewise implemented the judicial moratorium by suspending all new development in the undeveloped portion of the City (such as petitioners' proposed project) until adoption of a revised General Plan. Pet. App. A11; Exhibit 18; RT 876, 3980-82.

Petitioners' request for an ordinance to grandfather their project was denied on January 19, 1988. Pet. App. A12; RT 885. Petitioners filed this lawsuit on April 18, 1988. Pet. App. A2; JA 1. This lawsuit is limited to challenging the actions taken by the City prior to that date.[6]

2. Proceedings Below

Petitioners' suit, brought in part under 42 U.S.C. § 1983, raised a host of claims, but only two went to trial: that the City's actions violated their substantive due process and equal protection rights. Pet. App. A3. As to the first constitutional claim, the trial court assigned to the jury the task of deciding whether "all of the City's actions regarding [petitioners'] apartment project [were] performed for a purpose which was substantially related to the public health, safety, morals or general welfare." Pet. App. A43. As to the second constitutional claim (which is not

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[6] On June 2, 1989, the City adopted its new General Plan. Pet. App. A12; RT 2462. The new General Plan rezoned the foothills, including petitioners' land, for single-family residences. Exhibits 100, 104; RT 2466-67, 2484-85. Other developers' applications to build homes in the foothills have since been approved. RT 3176-77. This lawsuit, as it comes to this Court, does not involve a challenge to the post-filing adoption of the General Plan.

Petitioners filed a second lawsuit on September 29, 1989, challenging the General Plan. Pet. App. A2. Although certain actions relating to consolidation of issues in the two cases took place, the California Court of Appeal held: "no part of [the second suit] has been tried, and the issues in that case are not before us in this appeal." Pet. App. A16 (footnote omitted). The present case is limited to the action filed on April 18, 1988, challenging City actions before adoption of the General Plan.

pursued in the present petition), the trial court required the jury to decide whether "the City's actions . . . [were] motivated with a purpose of intending to discriminate against [petitioners]" and were "substantially related to a legitimate governmental interest." Pet. App. A44. The jury answered these questions favorably to petitioners and awarded $11.5 million in damages. Pet. App. A4.

After the trial court required a new trial on damages, cross-appeals followed. Pet. App. A4.[7] With respect to the City's appeal on liability, the Court of Appeal reversed. It held that the evidence, viewed "in the light most advantageous to" petitioners, could not legally support a judgment finding a violation of petitioners' rights to substantive due process or equal protection. Pet. App. A17 (internal quotation marks omitted); *see id.* at A18-A37.

As to substantive due process, the court explained repeatedly that, as petitioners themselves urged, "the ultimate issue [is] whether the City's actions were irrational or arbitrary." Pet. App. A21 n.10; *id.* at A26, A27, A29, A3 n.1 ("the court must find that the 'provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' " (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).[8] Initially, however, the court ruled that, under long-established California property law, petitioners "had no vested right to develop their property in accordance with the zoning in existence at the time they submitted their review of plans application." Pet. App. A25. But even if petitioners may

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[7] The damages award had been based entirely on the City's new General Plan, adopted after the filing of this suit and not at issue in this suit. *See* note 6, *supra*; RT 2458-2509, 2702-12, 2858-2958, 2712-2850, 4548-49, 4653-69, 4784-85. The trial court set aside the damages award on this basis. JA 1293.

[8] That ultimate issue, the court several times noted, is an issue of law and was not presented to the jury. Pet. App. A3 n.1, A21 n.10, A27 n.14.

invoke substantive due process protection without establishing a state-law-based property right in the building permit they sought, the court concluded, petitioners' claim still fails (Pet. App. A26-A32), because the City's conduct was not " 'legally irrational in that it is not sufficiently keyed to any legitimate state interests.' " Pet. App. A28.[9]

In particular, the court observed that the City Council and its members, in taking action to adopt new citywide zoning standards and apply them to the area that included petitioners' parcel, were "respond[ing] to concerns of constituents in the affected area," which were well documented in the record. Pet. App. A29-A30. The court quoted the Ninth Circuit's recognition that " '[t]he opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions.' " Pet. App. A30 (quoting *Nelson v. City of Selma*, 881 F.2d 836, 840 (9th Cir. 1989)). *See also* Pet. App. A31 (agreeing with First Circuit's recognition of legitimacy of locality's " 'purpose of protecting what it viewed as the town's basic character' "). The court added that the R-3 zoning changes here were "general in nature," applying to "all foothill properties and 40 or 50 proposed projects north of a certain line," and that "[t]he City's refusal to allow the project to be grandfathered resulted in the project being subject to the same rules as all other properties covered by the revised R-3 ordinance." Pet. App. A30. Agreeing with other judicial cautions against turning run-of-the-mill disputes over development restrictions into federal constitutional claims under substantive due process (*id.* at A31-A32), the court rejected petitioners' claim,

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[9] The court quoted this formulation from the First Circuit decision in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992). The court below canvassed the formulations of substantive due process standards in land-use cases in the federal circuits and found no meaningful differences relevant to this case: all reject claims where a rational basis is present. Pet. App. A28-A29 n.15.

stating: "we find a rational basis for the City's actions." *Id.* at A30.

The court also rejected petitioners' equal protection claim. Pet. App. A33-A37. Here, too, the test was one of "rational relation to a legitimate government objective." *Id.* at A33; *see Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-63 (1988). The court noted that it was irrelevant whether "certain actions of the City Council, specifically including certain actions of Councilman Marks, were taken with [petitioners'] project in mind" and that it found "nothing arbitrary or irrational in Councilman Marks' opposition to the project." Pet. App. A35 n.19. The court then reasoned (*id.* at A36-A37):

> None of the actions taken by the City Council, on their face, applied to this project alone. The regulation of foothill property, including the apartment projects proposed here, is clearly a legitimate public purpose. This is particularly true in this case, since the environmental questions raised by opponents of the project have never been answered. Zoning regulation of multi-family apartment units is unquestionably a legitimate public purpose. The classifications adopted by the City Council were clearly related to that purpose and we find no substantial basis for plaintiffs' equal protection challenge.

The Supreme Court of California subsequently denied petitioners' request for review. Pet. App. A41.

ARGUMENT

The Court of Appeal in this case rejected petitioners' substantive due process challenge on the ground that the City's conduct—adopting generally applicable legislative zoning measures and insisting that these measures apply to petitioners before they constructed buildings that would contravene and thus undermine the citywide standards established in the zoning rules—plainly had a rational relation to the legitimate public purposes of neighborhood preservation and environmental quality. Petitioners now

seek review based on a portrayal of lower court disagreements over the proper standards for substantive due process analysis in land-use cases. All of that discussion, however, is utterly irrelevant to this case.

Quite simply, petitioners are not attacking, and could not attack, the legal standard applied below, because they got review of their substantive due process claim under the very legal standard that they say they are entitled to: the *Euclid* rational basis test. Moreover, none of petitioners' extensive discussion of other courts' decisions reveals any differences among courts that are remotely material here, because no court imposes a more demanding standard than the rational relation standard applied by the court below and endorsed by petitioners. Thus, there is no legal issue presented by this case. As certiorari is not warranted to review the lower court's correct application of the unchallenged legal standard to the specific facts in this case, the petition should be denied.

1. Petitioners' contention is that substantive due process requires that challenged restrictions on land use must meet the "rational relation" or "rational basis" test derived from *Village of Euclid v. Ambler Realty Co.*, *supra*, and *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). Pet. 15, 17; *see id.* at 13-19. Under petitioners' own view, and as the relied-on decisions of this Court make clear, that is the *most* they are entitled to in raising a claim based on substantive due process. If a land-use restriction meets that test, petitioners do not, and could not, suggest any authority for invalidating it under substantive due process.

Petitioners' argument for certiorari here must be rejected for the simple reason that the court below tested their claim under the very standard they urge. The Court of Appeal, after assuming that petitioners could invoke substantive due process without first demonstrating a state-law property entitlement to the desired building permits, reviewed petitioners' claim under the rational relation

standard that petitioners endorse: the court quoted the *Euclid* standard (Pet. App. A3 n.1) and said again and again that it was evaluating the City's conduct here under that standard. *See*, *e.g.*, Pet. App. A21 n.10 ("ultimate issue of whether the City's actions were irrational or arbitrary"), A27 ("[w]e therefore consider the sufficiency of the evidence of a substantive due process violation arising from arbitrary or irrational actions" (footnote omitted)), A28 (quoting First Circuit test of whether action " 'is legally irrational in that it is not sufficiently keyed to any legitimate state interest' "), A29 ("plaintiffs have not, as a matter of law, shown arbitrary or irrational government action"), A32 ("It is sufficient that [the legislative] processes are rational, and not arbitrary or irrational."). And the court framed its ultimate conclusion in the precise words petitioners use: "we find a rational basis for the City's actions." Pet. App. A30. There is no warrant whatever for a grant of certiorari to impose on the court below the legal standard that it has in terms already applied to petitioners' claim.

Petitioners therefore must resort to passing suggestions that the court below somehow departed from this standard when applying it. But such a challenge to the application of a correct legal standard is not normally a ground for certiorari, and in any event petitioners' suggestions of misapplication are devoid of merit. What the Court of Appeal correctly held, even viewing the evidence in the light most favorable to petitioners, was that the conduct at issue —both the generally applicable, legislative zoning rules about development in the foothills and the application of those rules to petitioners—had an obviously reasonable relation to traditional, legitimate public interests in neighborhood character and environmental quality. Given the clear evidence of community concern about neighborhood character, the environmental problems raised by petitioners' project, and the fact that the City's zoning measure applied citywide and did not remotely single out petitioners for special treatment, there is no basis for overturning the court's conclusion.

In particular, petitioners could not plausibly claim that there is anything illegitimate, or unfamiliar, about public officials' addressing a legitimate public concern through general legislative action and taking steps to ensure coverage of specific projects that present the targeted problem, including a specific project that was part of the impetus for the governmental action. *Cf. D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991) (in First Amendment context, nothing illegitimate about local ordinance triggered by awareness of specific project).[10] And this case does not involve a situation where an individual property holder has been singled out for treatment inexplicably different from that accorded other, similarly situated property owners (which is presumably why petitioners have dropped their equal protection claim). Moreover, petitioners' vivid descriptions of supposedly "Machiavellian" actions of Councilman Marks —he "ramroded" a measure through the City Council, he "imposed" a requirement (the City Council adopted a generally applicable measure), he "fashioned a procedure" (the City Council adopted a generally applicable measure), he "bullied and intimidated a Council colleague," *see* Pet. 8-9—are nothing more than the passionate characterizations, by one who lost in the political process, of the vigorous and determined efforts of a public official who opposed their actions on legitimate grounds. *See* Pet. App. A35 n.19 ("nothing arbitrary or irrational in Councilman Marks' opposition to the project"). There is nothing improper about public officials' aggressive pursuit of government action that is itself legitimate.[11]

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[10] We note again that that there is no takings claim made in this case. (Petitioners had not undertaken construction of their three-story apartment complex, and the City's actions hardly foreclosed development of their land.) Nor is there a distinctive due process "retroactivity" claim in this case. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994). (It is patently reasonable for a local government to apply new zoning standards to all projects not yet approved for construction.)

[11] Nor is there any merit to the apparent suggestion (not ever made openly as an argument) that the *jury* in this case was entitled

2. Petitioners devote the bulk of their petition to trying to portray two separate conflicts among the lower courts that they say justify review in this case. One alleged conflict involves the precise test applied to judging whether local government restrictions on land use are constitutionally justified under substantive due process doctrine. Pet. 11-19, 25-29. The other involves the question whether a "property" right under state law must be proved at the threshold to invoke substantive due process. Pet. 19-25. But whatever conflicts may exist on those issues cannot justify review here, because the resolution of any such disagreements cannot possibly affect the result in this case. As to the first, the supposedly conflicting standards are *less* favorable to petitioners than the standard applied by the court below. As to the second, the court below has already held that petitioners' claim must be rejected even if their view is correct on this issue. Thus, no differences among other courts on either issue could alter the rejection of petitioners' substantive due process claim in this case.

a. Petitioners' principal claim of conflict is that, while the rational relation test governs in most courts, a different test has been applied by the First Circuit and by at least some panels of the Seventh and Eighth Circuits (and a few state courts following these circuits). Pet. 11-19. Even if petitioners' characterizations of differences among circuits were correct, however, the point would be completely irrelevant here. After all, the minority's "aberrant position" (Pet. 16) is, according to petitioners, one that demands *less* justification from local governments than the rational relation test that was applied, and that petitioners ask to be applied, in this very case. Pet. 16-17. No conflict material to this case is created by other judicial deci-

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to decide the legal issue whether there was a rational basis for the action challenged as violating substantive due process. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938); *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

sions that would reach exactly the same result as the court below and provide petitioners even less of a claim than the court below recognized.

Although that is a sufficient reason to reject the supposed conflict as a ground for review in this case, petitioners have in fact overstated the differences among formulations in the circuits, which may not actually amount to any meaningful, outcome-determinative difference in legal requirements for local governments. Notably, while petitioners rely chiefly on the First Circuit as departing from the rational basis test derived from *Euclid*, it is hardly clear that the First Circuit truly has an "aberrant position" on this issue (Pet. 16). The very decision that petitioners cite, *PFZ Properties*, expressly invokes the requirement that the government action not be " 'legally irrational in that it is not substantially keyed to any legitimate state interests' " (quoting a D.C. Circuit decision) and then cites in support a First Circuit precedent that it quotes as applying a " 'rational basis' test." 928 F.2d at 31-32.[12] *See also Gilbert v. City of Cambridge*, 932 F.2d 51, 65-66 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) (explicitly invoking rational basis test); *Smithfield Concerned Citizens for Fair Zoning v. The Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990) (measure valid unless it "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense" (internal quotation marks omitted)); *cf. Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994) ("we have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in *every* conceivable case").

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[12] As petitioners note (Pet. 13), this Court initially granted reivew of *PFZ Properties*, but then, after briefing and oral argument, dismissed the petition as improvidently granted. *See* 503 U.S. 257 (1992).

Petitioners also suggest that there are some *intra*-circuit variations within the Seventh and Eighth Circuits. Pet. 17. That suggestion, however, furnishes no ground for review by this Court. The Circuits themselves, sitting en banc, are the proper places to resolve any such conflicts if they truly exist—that is, if any differences in formulation produce actual differences in result over what actions a local government is constitutionally permitted to take. And it would be particularly inappropriate, as we have noted, to grant review in a case like the present, where the most demanding of the allegedly differing standards has been applied and held satisfied.

Finally, petitioners point to an assortment of decisions that, they say, "have uniformly found substantive due process violations where actions of local officials are specifically directed at blocking a development project approval." Pet. 26; *see id.* at 25-29. But petitioners properly refrain from making any suggestion that these decisions establish as the law in particular circuits some standard different from and more demanding than the rational basis test they themselves endorse. And, in fact, all of the cited decisions that recognize a claim (few actually find liability) do so based on plainly illegitimate (*e.g.*, religion or speech-related) reasons for the challenged government actions or the complete absence of an apparent legitimate public purpose behind the action, often evidenced by a singling out of a particular property owner for treatment inexplicably different from that afforded similarly situated owners.[13] This case, of course,

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[13] *See Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 268, 269 (3d Cir. 1995) ("for reasons unrelated to the merits"; "reasons unrelated to an appropriate governmental purpose"), *petition for certiorari pending*, No. 95-249 (filed Aug. 11, 1995); *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) ("impermissible political animus"); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) ("partisan political or personal reasons unrelated to the merits"); *Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983) ("manifest arbitrari-

involves no such scenario. In short, petitioners' first question presented does not warrant review in this case.

b. Petitioners also seek certiorari here (their second question presented) on the ground that there is a circuit conflict over whether a landowner challenging a limitation on land use (through, *e.g.*, a building-permit requirement) must establish a state-law entitlement to the desired use (a "property" right, under *Board of Regents v. Roth*, 408 U.S. 564 (1972)) in order to invoke substantive due process. Pet. 19-25. Most of petitioners' presentation, aside from acknowledging the widespread recognition of such a requirement, does no more than point to several circuits that by their actions have "assume[d]" that no such showing is needed or that "appear" not to require such a showing or that are "divided on the issue." Pet. 20-22 (Ninth, First, Eighth, Seventh Circuits). But petitioners also quote a recent decision of the Third Circuit that seems squarely to reject such a requirement, allowing

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ness" and personal animus in singling out plaintiff); *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (religious basis); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (demanded waiver of other constitutional right); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991) (requiring proof that action taken "for improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis"); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (not motivated "by legitimate regulatory concerns"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409, 1410 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) ("malicious, irrational and plainly arbitrary"; "for no legitimate reason"); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991), *vacated*, 113 S. Ct. 31 (1992), *on remand*, 987 F.2d 662 (9th Cir. 1993) (quoting *Euclid* test). (Later cases in the Ninth Circuit—the circuit embracing the State at issue here—repeatedly confirm that circuit's application of the rational basis test. *E.g.*, *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994); *Halverson v. Skagit County*, 42 F.3d 1257, 1261-62 (9th Cir. 1994); *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995).)

a landowner without more to invoke substantive due process to challenge restrictions on the land's use. Pet. 20, quoting *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 600-01 (3d Cir. 1995), *petition for certiorari pending*, No. 95-163 (filed July 28, 1995).

This conflict may warrant review in an appropriate case, at least if it can be shown that differences over this threshold step in the constitutional analysis result in bottom-line differences in constitutional result. But the conflict is utterly immaterial to this case. The Court of Appeal below expressly held that, even if petitioners are correct in their invocation of substantive due process in the absence of a state-law entitlement to their desired building permit, their substantive due process claim still fails—under the very rational basis test that petitioners endorse. Thus, even if petitioners were to prevail on their second question presented in the petition, the judgment below would remain unchanged, for they already have received from the court below everything that they could receive if they prevailed on their threshold "property right" contention: application of the rational relation standard to test the City's challenged actions. In these circumstances, the second question presented cannot affect the outcome of this case and cannot justify review.

3. Several other petitions are pending in this Court raising issues related to either the first or second of petitioners' questions presented. Those petitions, however, should in no way affect the disposition of this case: *this* petition should be denied. Those petitions which complain of allegedly *lesser* standards than the rational relation test cannot possibly affect this case, because petitioners received review under the rational relation test, precisely as they demanded.[14] And those petitions which raise the

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[14] *See Triomphe Investors v. City of Northwood*, No. 94-1991; *Woodpointe Inn Assoc. v. City of Harper Woods*, No. 94-2001; *Jolicoeur Furniture Co. v. City of Woonsocket*, No. 95-193.

threshold "property right" issue cannot possibly affect this case, because petitioners' claim was rejected below even on the assumption that they were correct in their view on this issue.[15] In short, even if this Court grants certiorari in one of the other cases, the petition in this case should be denied outright.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 19, 1995

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[15] *See Triomphe Investors v. City of Northwood*, No. 94-1991; *Zoning Board v. DePlasio*, No. 95-163; *Bensalem Township v. Blanche Road Corp.*, No. 95-249.